STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
E. Thomas Fitzgerald, PJ, Donald Holbrook, Jr. and Mark Cavanaugh, JJ
Affirming the Circuit Court for the County of Kent, Donald A. Johnston, J

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

LORD SHAWN RUSSELL,

Defendant-Appellant.

_____/

Supreme Court
No. 122998

Court of Appeals
No. 230382

Kent County Circuit
Court No. 99-07860-FH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The People accept Defendant-Appellant's Statement of Appellate Jurisdiction, and accept that this matter is properly before this Court.

COUNTER-STATEMENT OF QUESTION PRESENTED

I.

DID THE TRIAL COURT IMPROPERLY REQUIRE DEFENDANT TO REPRESENT HIMSELF WHEN DEFENDANT HAD ONE APPOINTED ATTORNEY WITHDRAW FROM HIS CASE, TOLD THE COURT ON THE DAY OF TRIAL THAT HE DID NOT WANT HIS SECOND ATTORNEY TO REPRESENT HIM, AND THE COURT INFORMED HIM THAT HE COULD (1) BE REPRESENTED BY RETAINED COUNSEL OF HIS CHOICE, (2) BE REPRESENTED BY HIS CURRENT APPOINTED COUNSEL, (3) REPRESENT HIMSELF WITHOUT AN ADVISOR, OR (4) REPRESENT HIMSELF WITH AN ADVISOR, HIS CURRENT APPOINTED COUNSEL?

The Court would answer "no."

Defendant answers "yes."

The People answer "no."

COUNTER-STATEMENT OF FACTS

The People accept defendant's statement of facts, but add the following:

Defendant Lord Shawn Russell was convicted in a jury trial of the offenses of possession with intent to deliver less than fifty grams of a mixture containing the controlled substance cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver less than fifty grams of a mixture containing the controlled substance heroin, MCL 333.7401(2)(a)(iv). On September 11, 2000, he was sentenced as a habitual offender, MCL 769.12, to 2-1/2 to 40 years' imprisonment on both charges.

On the day of trial, defendant made clear to the court that he did not want to be represented by his appointed counsel Damian Nunzio (Defendant-Appellant's Appendix, 41a). He described the ways in which he believed Mr. Nunzio's representation to be inadequate (Defendant-Appellant's Appendix, 35a-39a). The judge noted that defendant had been represented by another appointed attorney, Paul Mitchell, before the court replaced him with Mr. Nunzio (Defendant-Appellant's Appendix, 37a). The judge then explained to defendant that he had four options: (1) be represented by Mr. Nunzio; (2) retain counsel at defendant's expense; (3) represent himself without assistance; or (4) represent himself with Mr. Nunzio available as a consultant (Defendant-Appellant's Appendix, 37a-38a). Defendant reiterated that he did not want to be represented by Mr. Nunzio (Defendant-Appellant's Appendix, 41a). The court again explained to defendant what his options were, after warning him about the dangers of self-representation (Defendant-Appellant's Appendix, 41a-43a). Defendant insisted that he had a right to have new counsel appointed (Defendant-Appellant's Appendix, 43a). The court pointed out that defendant had a right to appointed counsel, but not necessarily appointed

counsel that defendant would "find to be personally pleasing to yourself" (Defendant-Appellant's Appendix, 43a). Defendant then complained that the court had allowed his earlier attorney, Paul Mitchell, to withdraw; the court indicated that Mitchell had withdrawn because of a breakdown in the relationship with defendant (Defendant-Appellant's Appendix, 43a-44a).

Mr. Nunzio then addressed the court, saying that he had been unaware of any breakdown in the attorney-client relationship and that he was prepared to go to trial (Defendant-Appellant's Appendix, 46a-47a). After the court told defendant that it saw no problem from Mr. Nunzio's standpoint, defendant again said that he had problems with Mr. Nunzio, and referred to a "grievance opinion" (Defendant-Appellant's Appendix, 47a-48a). Mr. Nunzio told the court he was unaware of any grievance being filed, saying that he had received no notice of a grievance being filed (Defendant-Appellant's Appendix, 48a). The court informed defendant that it also was unaware of any grievance being filed (Defendant-Appellant's Appendix, 48a). It then told defendant again that defendant had to make a choice as to how he wanted to proceed, and offered him the opportunity to consult with Mr. Nunzio before he made a choice (Defendant-Appellant's Appendix, 48a-49a). Defendant said, "Your Honor, I thought I made myself clear here," after which the court pointed out that defendant had not chosen one of the options given him (Defendant-Appellant's Appendix, 49a). The court again went through what defendant's options were (Defendant-Appellant's Appendix, 49a). The court suggested to defendant that he was not versed in legal procedure; defendant agreed with the court's assessment (Defendant-Appellant's Appendix, 49a).

Defendant then described what he considered to be Mr. Nunzio's deficits in representing him. First, he said that no "evidentual" hearing (apparently a preliminary examination) had been held; the court corrected defendant, saying that one had, in fact, been held (Defendant-

Appellant's Appendix, 50a-51a). Defendant then claimed that no motion under the "14 day rule" had been filed; the court noted that the motion would had to have been filed by Mitchell when he still represented defendant (Defendant-Appellant's Appendix, 51a). Defendant further complained that he had not been given an opportunity to view the evidence received by Mr. Nunzio; the court offered him an opportunity to view the evidence (Defendant-Appellant's Appendix, 51a-53a). Defendant then said that he needed his witnesses for trial (Defendant-Appellant's Appendix, 53a-54a). Mr. Nunzio informed the court that "[T]his is now news to me. . . . [I]f [defendant] has relevant triable witnesses, I'd certainly be more than happy to meet with him and discuss who those witnesses might be" (Defendant-Appellant's Appendix, 54a). After the court offered defendant the opportunity to consult with Mr. Nunzio, defendant said that he did not "want any contact with Mr. Nunzio," and claimed that Mr. Nunzio had "told me that he will convict me" (Defendant-Appellant's Appendix, 55a-56a). Defendant went on to say that "there's no way that I will let him try to defend me" (Defendant-Appellant's Appendix, 56a). The court then indicated to defendant that, since he did not appear to want to provide Mr. Nunzio with the names of his witnesses, "I don't know how we can possibly get them in here" (Defendant-Appellant's Appendix, 56a). The court offered to issue subpoenas for the witnesses if defendant would give the information to the court (Defendant-Appellant's Appendix, 56a). It also indicated to defendant that it was time to proceed with the case (Defendant-Appellant's Appendix, 56a).

Defendant then said the following:

> All right. Well, I just want it noted that I have stated the conflict between me and attorney Nunzio, and the statements that Mr. Nunzio has made in regards to me and my case, and there's no way that I would feel comfortable with him having anything to do with the defense on my behalf.

> And I'm requesting that you remove him from my case [Defendant-Appellant's Appendix, 57a].

He went on to request that new counsel be appointed for him (Defendant-Appellant's Appendix, 57a). The court responded that Mr. Nunzio was defendant's appointed counsel, and that defendant had not given a reasonable basis for removing Mr. Nunzio from the case (Defendant-Appellant's Appendix, 57a). The court then recommended that defendant allow Mr. Nunzio to represent him, adding, "Failing that, I will protect your right to defend yourself" (Defendant-Appellant's Appendix, 58a). The court then adjourned briefly so defendant and Mr. Nunzio could go over the documentary evidence in the case (Defendant-Appellant's Appendix, 58a-59a).

When the court reconvened, Mr. Nunzio told the court what documents he had provided to defendant (Defendant-Appellant's Appendix, 60a). He then added, "And just to further note that I believe [defendant] still contends he wishes to represent himself" (Defendant-Appellant's Appendix, 60a). When the court asked defendant directly if he wanted to represent himself at trial, defendant answered, "Your honor, first of all, I only spoke with Mr. Nunzio for about five minutes" (Defendant-Appellant's Appendix, 60a). The court offered to give defendant more time to speak with Mr. Nunzio; defendant declined the offer (Defendant-Appellant's Appendix, 60a). He then told the court that he had not received a complete copy of the documents (Defendant-Appellant's Appendix, 60a). After some discussion, the court concluded that, in fact, defendant had received all the documents (Defendant-Appellant's Appendix, 65a). Again, the court told defendant that it did not see any conflict between Mr. Nunzio and defendant, and that any problem "is of your creation" (Defendant-Appellant's Appendix, 66a-67a). Defendant

continued to argue with the court as to whether Mr. Nunzio was representing his best interests (Defendant-Appellant's Appendix, 67a-68a). The court finally told defendant the following:

> [Mr. Nunzio]'s a good lawyer and he's doing his job. My suggestion to you is that you cooperate with the man so he can do his job. And if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do. [Defendant-Appellant's Appendix, 68a]

Defendant said he wanted competent counsel; the court responded that defendant had competent counsel sitting next to him (Defendant-Appellant's Appendix, 68a). Finally, the court concluded that a jury panel would be called (Defendant-Appellant's Appendix, 70a).

Defendant has accurately stated the procedural history of this case in the Court of Appeals.

ARGUMENT

I.

THE TRIAL COURT DID NOT IMPROPERLY REQUIRE DEFENDANT TO REPRESENT HIMSELF. DEFENDANT HAD ONE APPOINTED ATTORNEY WITHDRAW FROM HIS CASE, TOLD THE COURT ON THE DAY OF TRIAL THAT HE DID NOT WANT HIS SECOND ATTORNEY TO REPRESENT HIM, AND THE COURT INFORMED HIM THAT HE COULD (1) BE REPRESENTED BY RETAINED COUNSEL OF HIS CHOICE, (2) BE REPRESENTED BY HIS CURRENT APPOINTED COUNSEL, (3) REPRESENT HIMSELF WITHOUT AN ADVISOR, OR (4) REPRESENT HIMSELF WITH AN ADVISOR, HIS CURRENT APPOINTED COUNSEL.

Preservation of Error: Defendant asserted at different points in the pretrial proceedings that he wanted to be represented by new counsel (Defendant-Appellant's Appendix, 43a, 57a, 68a). Defendant has preserved his claim of error.

Standard of Review: There does not appear to be a case that articulates a standard of review for a claim of error that a defendant was denied his right to counsel. However, in an analogous area, the question of whether *Miranda* warnings are given is a mixed question of fact and law. See *People v Coomer*, 245 Mich App 206, 218-219; 627 NW2d 612 (2001). In fact, our Supreme Court has noted that the trial judge is in the best position to determine whether a waiver of counsel is made knowingly and voluntarily. *People v Adkins (After Remand)*, 452 Mich 702, 723; 551 NW2d 108 (1996). This language tends to indicate that the question of whether a waiver has occurred is a fact question, reviewed for clear error. However, the question of whether a waiver is legally sufficient is an issue of constitutional law, which is reviewed de novo. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1995).

Argument: Defendant's claim, that he was improperly denied his right to counsel, is without merit.

As discussed in the statement of facts, defendant made clear to the court that he would not proceed to trial with his appointed counsel, Damian Nunzio (Defendant-Appellant's Appendix, 41a, 43a, 56a, 57a, 67-68a). Although defendant never expressly told the court that he wanted to represent himself, what becomes clear from his dialogue with the court is that he was so unwilling to go to trial with Mr. Nunzio representing him that he would represent himself, if need be. When he first told the court of his displeasure with Mr. Nunzio, the court explained to him his options (Defendant-Appellant's Appendix, 37a-38a). When the court asked defendant whether he wanted to (1) proceed to trial with Mr. Nunzio as counsel, (2) retain counsel, (3) represent himself, or (4) represent himself with Mr. Nunzio as an advisor, defendant replied that he wanted new counsel appointed (Defendant-Appellant's Appendix, 41a, 43a). Over an extended colloquy with the court, defendant repeatedly asserted that he did not want to be represented by Mr. Nunzio, culminating in defendant telling the court that "there's no way that I will let him try to defend me" (Defendant-Appellant's Appendix, 56a). The court repeatedly asked defendant what his decision was on representation. Clearly, the court believed that defendant's choice was to represent himself. In addition, defendant rejected all the alternatives given him, other than self-representation. After defendant's appointed counsel met with him, counsel told the court that defendant "still contends he wishes to represent himself" (Defendant-Appellant's Appendix, 60a). The court again asked defendant whether he wanted to represent himself; instead of answering, defendant challenged counsel's representations as to the amount of time they had conferred (Defendant-Appellant's Appendix, 60a). Ultimately, the court concluded that defendant was choosing to represent himself, and

summoned the venire (Defendant-Appellant's Appendix, 70a). The Court of Appeals affirmed, concluding that defendant, by his conduct, demonstrated his unequivocal choice to proceed pro se. *People v Russell*, 254 Mich App 11, 17; 656 NW2d 817 (2002).

Defendant characterizes the above holding as "truly a dangerous precedent that erodes the right to counsel and a fair trial" (Defendant's brief, 12). However, the holding of the Court of Appeals does not run contrary to any Michigan precedent, and in fact follows the same reasoning used by other states and, more significantly, by the federal courts in resolving the issue of the right to counsel. A request to represent oneself must be unequivocal, made knowingly, intelligently, and voluntarily, and must not disrupt, unduly inconvenience, and burden the court. See *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Further, the People are aware that all presumptions are indulged against waiver of the fundamental right to counsel. *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938); *Adkins, supra*, 452 Mich 721. Further, we acknowledge that, in the absence of an unequivocal waiver, the court should order that the defendant be represented by counsel. *Id.* at 722, n 18.

In the present case, there was no point at which defendant actually said to the court that he wanted to represent himself; that is, there is no phrase like "I want to represent myself" in this record. However, defendant's conduct in rejecting the option of proceeding with appointed counsel[1] is just as clear a statement that he wished to proceed pro se. Although *Adkins, supra*,

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[1] Defendant was also presented the option of retaining counsel of his choice (Defendant-Appellant's Appendix, 41a). However, defendant never asserted that he had the financial ability to retain counsel. In addition, he did not argue on appeal, and does not argue before this Court, that he could have retained counsel.

452 Mich 752, n18 makes reference to "stat[ing] a desire for self-representation," it does not follow that an express waiver of counsel is conditioned on any talismanic phrasing, or on any particular oral representations at all.[2] Defendant believes that this lack of an express statement, along with his request for new appointed counsel, is dispositive of his claim. Certainly, nothing in our court rules requires that an unequivocal waiver of the right to counsel be shown only by a defendant's oral representations.

Waiver of rights from conduct is hardly a new concept; in other areas, this Court has recognized that fundamental rights may be waived by conduct. See *People v Stone*, 234 Mich App 117, 125; 593 NW2d 880 (1999) (right to privacy may be waived by conduct). This principle has been recognized in other states in the context of waiver of the right to counsel. See *Poynter v State*, 749 NE2d 1122, 1126-1128 (Ind, 2001); *State v Hook*, 33 Ohio App 3d 101, 103; 514 NE2d 721 (1986). The federal courts have also recognized the principle that a waiver of counsel may be inferred from conduct. *United States v Hoskins*, 243 F3d 407, 410 (CA 7, 2001) ("It is not necessary, however, 'that the defendant verbally waive his right to counsel; so long as the district court has given a defendant sufficient opportunity to retain the assistance of appointed counsel, defendant's actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice.'"); *United States v Kneeland*, 148 F3d 6, 11 (CA 1, 1998). The Sixth Circuit has held that a defendant may, by

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[2] *Adkins* did not involve an issue of whether a defendant could, by his conduct, unequivocally waive the right to self-representation. In fact, both Kenneth Adkins and Ronnie Suggs, the two defendants whose cases were discussed, said they wanted to represent themselves. *Adkins, supra*, 452 Mich 110 (Adkins), 114 (Suggs) .

understandingly rejecting counsel appointed for him, be considered to have waived the right to counsel. *United States v Krzyske*, 836 F 2d 1013, 1017 (CA 6, 1988).

In *Krzyske*, *supra*, the defendant moved to be represented by "lay counsel," claiming that the Constitution guarantees the right to be represented by counsel, whether or not the counsel is an attorney. 836 F 2d 1015. The magistrate informed him that he could not proceed with lay representation, but informed him that he had the right to court-appointed counsel if he could show that he was indigent. *Id.* at 1016. Mr. Krzyske rejected this option, refusing to fill out an affidavit of indigency. *Id.* On the day of trial, Mr. Krzyske said he would accept the assistance of a court-appointed attorney if he could not be assisted by a nonlawyer, and that he needed the help of an attorney to fill out the affidavit of indigency. *Id.* The trial court ruled that, under the circumstances, Mr. Krzyske should proceed pro se. *Id.*

In overruling Mr. Krzyske's claim that he was improperly denied his right to counsel, the Sixth Circuit noted that "a litigant cannot play a 'cat and mouse game' with the court in order to preserve an issue or appeal or to delay proceedings." *Krzyske, supra*, 836 F 2d 1017. It also noted that respondent was aware that he had a reasonable opportunity to retain counsel. *Id.*

Defendant's conduct in this case made clear that, under the circumstances, he was waiving the right to counsel. Defendant made clear to the court that he would not allow Mr. Nunzio to represent him. The court repeatedly explained to defendant what his choices were, one of which was to represent himself. Although defendant tried on several occasions to choose an option that was not included among those outlined by the court (having new counsel appointed), he made it clear that Mr. Nunzio was not to represent him. Defendant's repeated attempts to get new appointed counsel (his third, had the court granted his request) is nothing

other than the "cat and mouse games" decried by the Sixth Circuit. Since he gave the court no indication that he wanted to (or could) retain counsel, the only option left was self-representation. In addition, although defendant never responded directly to the court's question about what option he chose, it is clear from counsel's representations that defendant wanted to represent himself.[3] The combination of defendant's rejection of all options other than self-representation, together with defense counsel's assertion that defendant wanted to represent himself, sufficiently show that defendant was waiving his right to counsel in preference to going to trial with an attorney he did not want.

The fact that proceeding pro se was not defendant's first choice is irrelevant, as long as defendant was not entitled to his first choice (i.e., having new counsel appointed). The Supreme Court of Utah was faced with a similar dilemma in *State v Bakalov*, 979 P2d 799 (Utah, 1999). The procedural background is provided in the opinion:

> [T]he district appointed counsel for Bakalov, who is indigent. Counsel was competent and conflict-free. Bakalov refused to cooperate with assigned counsel, however, and counsel was compelled to withdraw. Bakalov repeatedly insisted that the trial court appoint new counsel from outside the court's jurisdiction and with no association with the [Legal Defender's Association]. He also insisted that appointed counsel have no contact with the prosecutor, discuss no possibility of a plea bargain or deportation to resolve the case, and strictly follow tactics dictated by Bakalov.
>
> Faced with these demands, the trial court presented defendant with the choice of either accepting representation by the attorney who had previously acted as

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[3] The People are not arguing that defendant's right to counsel could be waived by anyone other than himself. See *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000) (defendant must personally waive the right to counsel). However, counsel's representation to the court during the pretrial proceedings serves to clarify what defendant himself had decided and was otherwise making clear to the court. Given defendant's recalcitrant behavior during the proceedings, counsel's representations were necessary to give voice to what defendant had decided.

> standby counsel or defending himself. Bakalov elected to defend himself. [*Id.* at 809.]

The Supreme Court of Utah found that, even though Bakalov had told the court that he wanted new counsel, the trial court was not bound to accede to his wishes when defendant could not show good cause for substituting counsel. *Id.* The options given to defendant, representation by counsel or self-representation, were "constitutionally acceptable." *Id.* The court also concluded that Bakalov's waiver of the right to counsel was made knowingly and voluntarily. *Id.* at 811.[4]

Just as in *Bakalov*, defendant in this case demanded that new counsel be appointed to replace his current appointed attorney, Damian Nunzio. He could not show good cause for replacing Mr. Nunzio. His only complaint was that he could not communicate with Mr. Nunzio. This does not constitute good cause for substituting counsel. *People v Traylor*, 245 Mich App 460, 462-463; 628 NW2d 120 (2001). The court correctly told defendant that it was not required to search for counsel that was acceptable to defendant. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). Nonetheless, defendant insisted that "there's no way" that Mr. Nunzio would represent him. It is clear that defendant rejected the option of being represented in any way by Mr. Nunzio. In addition, he said nothing to the court about retaining counsel. The only option left involved representing himself. Admittedly, as previously noted, there is authority in Michigan stating that, if a defendant does not unequivocally waive the right to counsel, the court should direct that the defendant be represented by his appointed counsel. *Adkins, supra*, 452 Mich at 722, n 18. However,

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[4] A similar analysis and result can be found in *Wilks v Israel*, 627 F2d 32, 35-36 (CA 7, 1980).

whether a waiver of counsel is unequivocal must be determined by looking at the context in which the request occurs. Defendant's choices in the present case were limited. While he told the court that he wanted new counsel appointed, he failed to make the showing necessary to obtain new appointed counsel. Given that he rejected his current appointed counsel and apparently could not afford to retain counsel, his only other option was to represent himself. It is irrelevant that, if he had unlimited choices, he would not have chosen self-representation. He was given several options, all but one of which he found to be unacceptable (or, in the case of retaining counsel, unattainable). Defendant knowingly and intelligently waived his right to counsel. His claim of error should be rejected.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the ruling of the Court of Appeals be AFFIRMED.

Respectfully submitted,

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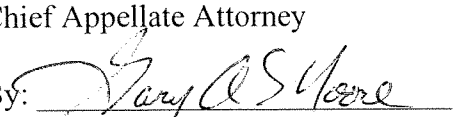
Dated: September 30, 2003

By: 
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